Filed 3/10/16 P. v. Johnson CA1/5

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL CHRISTOPHER JOHNSON, Defendant and Appellant.	A146309 (Contra Costa County Super. Ct. No. 5-131811-2)

Michael Christopher Johnson was sentenced to 15 years in prison after he pled no contest to kidnapping with the use of a firearm along with other charges. (Pen. Code, §§ 207, subd. (a), 12022.53, subd. (b).)[1] He appeals from orders denying his motion for substitute counsel under *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*) and his motion to withdraw his plea, both of which were filed after judgment was imposed. His court-appointed appellate counsel has filed a brief raising no issues, but seeking our independent review of the record pursuant to *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*) and *Anders v. California* (1967) 386 U.S. 738 (*Anders*). We find no arguable issues and affirm.

I. *FACTS AND PROCEDURAL HISTORY*

Appellant's ex-live-in girlfriend, Amy G., was working at a gas station. On December 27, 2012, appellant arrived and persuaded her to come outside to talk to him, where he asked her whether she liked her life. Amy warned appellant that an off-duty

[1] Further statutory references are to the Penal Code.

police officer was nearby, but the officer drove away and appellant pulled Amy by her hair to the back of the building, telling her to "shut up" and not to "say nothin.' " Amy saw that appellant had a gun. She told him to let her go but he told her to shut up and hit her in the head twice with the gun. Appellant asked Amy if she was going to leave the family and she tried to calm him down, telling him she would come home. Appellant said, "I told you I was gonna kill you if you ever tried to leave me."

Amy waved at a police patrol car driving by and it stopped. Appellant held Amy's hair and twisted her around and they fell to the ground. Appellant had the gun pointed at Amy as an officer told him not to move. The officer fired his gun twice, hitting appellant in the arm and shoulder. Appellant's gun flew from his hand and Amy was taken to the hospital where she received treatment for a head wound.

Following a preliminary hearing at which the foregoing evidence was adduced, the Contra Costa County District Attorney filed a second amended information charging appellant with premeditated attempted murder, kidnapping, corporal injury on a spouse or cohabitant, criminal threats, possession of a firearm by a felon, and assault with a firearm. (§§ 187, subd. (a)/664, subd. (a), 207, subd.(a), 273.5, subd. (a), 422, 29800, subd. (a)(1), 245, subd. (a)(2)). It was further alleged appellant had personally used a firearm and inflicted great bodily injury under circumstances involving domestic violence during the offenses and had suffered a prior conviction for inflicting corporal injury on a spouse or cohabitant. (§§ 12022.5, subd. (a), 12022.53, subds. (a) & (b), 12022.7, subd. (e), 273.5, subd. (e).)

On April 22, 2015, the first day set for trial on the charges, appellant entered into a negotiated plea agreement under which he would plead no contest to the kidnapping, corporal injury and felon in possession counts, and would admit a firearm enhancement in connection with the kidnapping and a prior domestic violence conviction in connection with the corporal injury count. (§§ 207, subd. (a), 273.5, subds. (a) & (e), 29800, subd. (a)(1), 12022.53, subd. (b).) The agreed-upon sentence was 15 years, consisting of the five-year middle term for the kidnapping count and 10 years for the firearm enhancement, with sentence on the remaining counts to run concurrently. (§§ 208, subd.

(a), 12022.53, subd. (b).) The remaining charges were dismissed, and the court sentenced appellant to prison for 15 years as agreed.

On May 29, 2015, appellant's trial counsel filed a post-judgment motion asking the court to appoint a new attorney for appellant so he could bring a motion to withdraw his plea on the ground he received ineffective assistance of counsel. On June 19, 2015, counsel lodged a notice of appeal and request for a certificate of probable cause with the trial court, which indicated that appellant was challenging the validity of his plea based on the alleged ineffective assistance of counsel. On June 25, appellant filed, in pro per, a second notice of appeal and request for a certificate of probable cause. Neither request for a certificate of probable cause was granted and the notices of appeal were deemed inoperative based on the lack of a certificate.

On July 31, 2015, the court held a *Marsden* hearing to determine whether new counsel should be appointed to represent appellant in a motion to withdraw his plea. The court denied the *Marsden* motion, but set the matter for a hearing on appellant's motion to withdraw his plea. Following a hearing on August 14, 2015, the court denied that motion as well.

On September 17, 2015, appellant filed a notice of appeal seeking review of the orders denying his *Marsden* motion and motion to withdraw his plea, accompanied by a request for a certificate of probable cause. On September 21, 2015, the superior court granted the request for a certificate of probable cause.

II. *DISCUSSION*

As required by *People v. Kelly* (2006) 40 Cal.4th 106, 124, we affirmatively note that appointed counsel has filed a *Wende/Anders* brief raising no issues, that appellant has been advised of his right to file a supplemental brief, and that appellant did not file such a brief. We have independently reviewed the entire record and considered issues noted by appellant in his notice of appeal and request for certificate of probable cause.

In his notice of appeal, appellant indicated he wished to challenge the trial court's denial of his post-judgment *Marsden* motion and motion to withdraw his plea based on

ineffective assistance of counsel. Both motions were predicated on claims that appellant's trial counsel was ineffective because (1) she should have filed a motion to dismiss the information under section 995; (2) she should have filed a motion to discover confidential police personnel records under *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*); and (3) she did not accurately advise appellant of the maximum sentence in the event he went to trial and was convicted of the charged offenses.

Assuming the trial court had the jurisdiction to consider a postjudgment motion to withdraw the plea (*People v. Casteneda* (1995) 37 Cal.App.4th 1612, 1616-1617), it did not abuse its discretion in denying that motion. (*Id*. at p. 1617). A defendant seeking to establish ineffective assistance of counsel must demonstrate: "(1) his or her counsel's performance was below an objective standard of reasonableness under prevailing professional norms and (2) the deficient performance prejudiced the defendant." (*People v. Breslin* (2012) 205 Cal.App.4th 1409, 1418 (*Breslin*), citing *Strickland v. Washington* (1984) 466 U.S. 668, 687, 691–692.) When a defendant has pleaded guilty or no contest, prejudice cannot be established unless there is a reasonable probability that but for counsel's errors, the defendant "would not have entered the plea and would have insisted on going to trial." (*Breslin*, at pp. 1418–1419.)

A reviewing court must defer to trial counsel's reasonable tactical decisions and will not reverse a judgment based on ineffective assistance when counsel acted for valid strategic reasons. (*People v. Jones* (2003) 29 Cal.4th 1229, 1254.) Here, defense counsel decided to forego a *Pitchess* motion because such a motion would not have been useful in a case where the charges were unaffected by the conduct of the officers who arrested appellant. Counsel also determined it would have been futile to bring a motion to dismiss the information under section 995, as the evidence presented at the preliminary hearing established probable cause for believing the charged offenses had been committed. These were reasonable strategic decisions.

Defense counsel acknowledged to the court that during one of her discussions with appellant, she was unsure of the precise punishment for *nonpremeditated* attempted murder and may have estimated the sentencing range to be 3, 5 and 8 years, rather than

the 5, 7 and 9 years actually established by section 664, subdivision (a). However, defense counsel correctly advised appellant that attempted murder *with premeditation*, which was charged in the information, carried a life term. Appellant has not carried his burden of establishing that counsel's advice regarding the attempted murder count, which was not a count to which he pled, affected his decision to enter into the plea agreement. (*Breslin*, *supra*, 205 Cal.App.4th at pp. 1418–1419.)

Counsel did not provide ineffective assistance of counsel, much less prejudicial ineffective assistance of counsel, and the court did not abuse its discretion in denying his motion to withdraw the plea. For the same reasons, the court did not abuse its discretion in denying the *Marsden* motion after a careful inquiry into the matter. (See *People v. Barnett* (1998) 17 Cal.4th 1044, 1085.)

We are satisfied appellant's appointed attorney has fully complied with the responsibilities of appellate counsel and that no arguable issues exist. (*Smith v. Robbins* (2000) 528 U.S. 259, 283.)

III. *DISPOSITION*

The judgment is affirmed.

NEEDHAM, J.

We concur.

JONES, P.J.

SIMONS, J.

(A146309)